

WILLKIE FARR & GALLAGHER

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Washington, DC  
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April 17, 1996

Ex Parte

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

APR 17 1996

Re: Ex Parte Submission  
GC Docket No. 96-42

Dear Mr. Caton:

Attached for inclusion in the above-captioned docket is a description of a proposed tri-partite mediation panel dispute resolution procedure, prepared and submitted on behalf of Corning, Incorporated ("Corning") for consideration as the "default" ADR procedure to be prescribed by the Commission in the above-captioned proceeding. The attached compromise proposal incorporates a number of features contained in the tri-partite mediation/recommendation option included in the ADR proposal described in the initial comments submitted on behalf of Bell Communications Research, Inc. ("Bellcore"), with several modifications which Corning believes are absolutely necessary in order to ensure that the Commission-prescribed procedure conforms to the requirements and intent of Section 273(d)(5) of the Communications Act.

As its prior submissions in this docket indicate, Corning continues to believe that the "default" ADR proposal described in Attachment A of Corning's initial comments would provide the most effective and fair means of resolving disputes arising under Section 273(d)(4) of the Communications Act in an appropriate manner. However, the compromise proposal attached hereto, developed by Corning following discussions with the Commission staff, provides an acceptable alternative basis for resolving technical disputes relating to the development of "industry-wide" standards and generic requirements by Bellcore and other non-accredited standards development organizations

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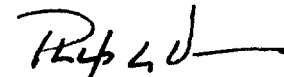
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("NASDOs"), in a manner consistent with the requirements and purposes of the statute. In addition, Corning believes that the terms of its compromise proposal should lay to rest any concern that Corning is opposed to a "default" ADR procedure that would lead to the resolution of disputed technical issues, as some parties have suggested in their comments concerning Corning's initial proposal.

Sincerely,

A handwritten signature in dark ink, appearing to read "Philip L. Verveer", with a stylized flourish at the end.

Philip L. Verveer

Enclosure

***Compromise Tri-Partite Mediation Panel Procedure for FCC Alternative  
Dispute Resolution Process under Section 273(d)(5)***

- 1.0 As required pursuant to Section 273(d)(4)(iv), of the Communications Act, a non-accredited standards development organization ("NASDO") "...shall attempt, prior to publishing a text for comment, to agree with the funding parties<sup>1</sup> as a group on a mutually satisfactory dispute resolution process..." which shall be their sole recourse for the resolution of disputes on "technical issues" between any funding party and the NASDO.
  - 1.1 Consistent with the statutory requirement of Section 273(d)(4)(iv), the NASDO must negotiate in good faith with the funding parties to establish a dispute settlement process that is acceptable to all the parties. This is necessary to ensure that use of the Commission-prescribed ADR process becomes the exception, not the rule.
- 2.0 If no dispute resolution process is unanimously agreed by "all the parties," pursuant to Section 273(d)(5) a funding party may utilize a dispute resolution procedure described herein as the FCC-prescribed alternative dispute resolution ("ADR") process. Other funding parties who can agree with the NASDO on a different process may decide to use that process as their sole recourse for the resolution of disputes. However, any party who dissents from that decision remains free to seek resolution using the Commission-prescribed ADR process.
- 3.0 The Commission-prescribed "default" ADR process shall involve a tri-partite mediation panel, which shall operate in accordance with the following guidelines:
  - 3.1 The party seeking ADR and the NASDO each will select an expert mediator within two days of the filing of the dispute with NASDO, with no restriction on the selection of individuals who participated in the standards or generic

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<sup>1</sup>"Funding parties" is a term included in the statute which is intended to encompass all interested parties who make a reasonable economic contribution to the NASDO-sponsored development of "industry-wide" standards or generic requirements. The term "funding parties" is not intended to include only those parties which traditionally have shared in defraying the expenses of Bellcore or other similarly-structured NASDOs. If the funding arrangements adopted by Bellcore operate to exclude from the Bellcore process vendors and other interested parties, Section 273(d)(4) of the statute will be rendered meaningless. To avoid this result, the FCC should clearly indicate in its decision that "funding" arrangements should not become a de facto barrier to participation in NASDO activities associated with the establishment of "industry-wide" standards and generic requirements, and direct that the contribution required for vendors should reflect their "in-kind" contribution (e.g., vendor technical submissions, as well as related technical information, personnel, and other resources) and the more limited, indirect benefits to them associated with the final output.

requirements development process,<sup>2</sup> and the two expert mediators will select a neutral third panel member acceptable to them within four days of their selection.

3.2 The mediators will review the proposed texts of the NASDO and any explanatory material provided to the funding parties by the NASDO, the comments and any alternative text provided by the funding party seeking ADR, any relevant standards which have been established or which are under development by an accredited-standards development organization, and any comments submitted by other funding parties.

3.2.1 Any party in interest submitting information to the panel for consideration (including the NASDO, the party seeking ADR, and the other funding parties) must disclose its ownership of intellectual property that may be advantaged or disadvantaged by the final decision, and the panel must consider such information in formulating its recommendation.

3.3 The mediators will have fifteen days in which to formulate a recommendation with respect to the issue or issues raised by the party seeking ADR. Recommendations will be adopted by majority vote of the mediators, who will produce a report to all of the funding parties that reaches a conclusion on each issue. The mediators must adopt one of the five options listed below:

- (1) the NASDO's proposal on the issue under consideration;
- (2) the position of the party seeking ADR on the issue under consideration;
- (3) a standard developed by an accredited standards development organization that addresses the issue under consideration;
- (4) a finding that the issue is not ready for a decision because there is insufficient technical evidence to support the soundness of any one proposal over any other proposal; or

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<sup>2</sup> While one or more of the mediators may have participated previously in the generic requirements development process, their role as mediators will be circumscribed. They will have to articulate their recommendations and rationales, and do so in the context of a tri-partite panel, which forces them to attempt to convince the neutral mediator of the validity of their positions.

- (5) any other resolution that is consistent with the standard described in Section 3.4.
- 3.4 The mediation panel must choose, from the five options outlined above, the option that provides the most technically sound solution that is commercially viable, and base its recommendation upon the substantive evidence presented to the mediators. The mediators must adopt a recommendation by majority vote within the timeline provided above.
- 4.0 The tri-partite panel's recommendation(s) must be included in the final industry-wide standard or industry-wide generic requirement, unless the funding parties decide within 30 days of the initiation of the dispute to reject the recommendation and accept one of the options specified in Section 3.3.
  - 4.1 Neither of the disputants (i.e., the NASDO and the funding party which invokes the ADR process) will be permitted to participate in any decision to reject the mediation panel's recommendation.
  - 4.2 In instances where any funding party has a direct or indirect equity interest (or equivalent thereof) in the NASDO, or any ownership interest in intellectual property that may be advantaged by the final resolution of the dispute, a decision to reject the mediation panel's recommendation and accept one of the options specified in Section 3.3 shall be by a unanimous vote of the funding parties, excluding the party which invoked the ADR process and the NASDO.
  - 4.3 In all other cases, a decision to reject the mediation panel's decision and accept one of the options specified in Section 3.3 must receive the support of three-fourths of the funding parties, excluding the party which invoked the ADR process and the NASDO.
- 5.0 All costs sustained by the mediators in conducting the mediation process will be incorporated into the cost of producing the industry-wide standard or industry-wide generic requirement.